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TEN JING ENTERPRISE SDN BHD v. HONG LEONG BANK BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ROZ MAWAR ROZAIN JC
[CIVIL SUIT NO: WA-21NCvC-81-11-2019]
27 FEBRUARY 2023

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Abstract – *A bank that is served with a seizure order and a freeze order prohibiting it from dealing with a current account has a duty to comply with any and all lawful orders pertaining to it. By closing the current account and remitting the monies to the Department of Insolvency, the bank has breached its statutory duty resulting in losses suffered by a third party who has a claim to it. Where there are bona fide parties who can show that they are the rightful owner of the said sum in the said account, the law allows and recognises that rightful bona fide ownership.*

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CUSTOMS AND EXCISE: *Seizure – Order of – Bank served with seizure order and freeze order prohibiting dealings with current account – Bank received notification company wound up and proceeded to close current account and remitted monies to Department of Insolvency – Whether resulted in loss suffered by bona fide third party entitled to monies in current account – Whether seizure order still valid and effective when bank released sum to Department of Insolvency – Whether bank owed duty to comply with order of seizure – Whether there was breach of statutory duty – Whether there was negligence by bank – Whether third party entitled to claim against bank – Anti-Money Laundering, Anti-Terrorism Financing Act 2001, ss. 44, 50(1), 54(3), 56 – Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities 2001, s. 52A*

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TORT: *Negligence – Professional negligence – Banking – Bank served with seizure order and freeze order prohibiting dealings with current account – Bank received notification company wound up and proceeded to close current account and remitted monies to Department of Insolvency – Whether resulted in loss suffered by bona fide third party entitled to monies in current account – Whether seizure order still valid and effective when bank released sum to Department of Insolvency – Whether bank owed duty to comply with order of seizure – Whether there was breach of statutory duty – Whether there was negligence by bank – Whether third party entitled to claim against bank – Anti-Money Laundering, Anti-Terrorism Financing Act 2001, ss. 44, 50(1), 54(3), 56 – Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities 2001, s. 52A*

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STATUTORY INTERPRETATION: *Statutes – Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities 2001 – Section 52A – Insertion of s. 52A after commencement of forfeiture proceedings – Whether retrospective – Whether applied to seizure orders issued before law came into force*

I

On 3 January 2013, a freeze order under s. 44 of the Anti-Money Laundering, Anti-Terrorism Financing Act 2001 ('AMLATFA') was issued to the first defendant by the third defendant under the hand of the second defendant. It was for the current bank account of TS Steel Sdn Bhd at the first defendant, as part of the effort to preserve the assets pursuant to an investigation into an alleged customs duties evasion scheme under the direction of the third defendant. The freeze order was valid for 90 days as per s. 44(5) of the AMLATFA. On 1 April 2013, before the expiry of the 90 days, the Public Prosecutor ('PP') issued a seizure order that the first defendant 'not to part with, deal in, or otherwise dispose of such property or any part of it until this order otherwise revoked or varied' of which the said current account was listed as one of the properties in the seizure order. The seizure order was issued under s. 50(1) of the AMLATFA. In March 2014, when the PP commenced the forfeiture application to forfeit without prosecution, several bank accounts were involved in the alleged customs duties evasion scheme that included the said current account with the first defendant. For the forfeiture proceedings under s. 56 of the AMLATFA, a confirmation was obtained from the first defendant as to the amount in the said current account. On 1 September 2014, s. 52A of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('AMLATFAPUA') came into force which provided that when there was no prosecution against the party whom the seizure order was issued, its expiry would be 12 months from its issuance or if there was a prior freeze order then 12 months from the issuance of that order. On 8 September 2014, at the forfeiture proceedings, a third-party notice was issued under s. 61(2) of the AMLATFA. On 20 November 2014, following a notification that TS Steel Sdn Bhd was wound up, the first defendant had closed the account and remitted RM1,270,262.15 in it to the Department of Insolvency. On 14 May 2015, the High Court granted an order in favour of the plaintiff and ordered for the said sum to be released to the plaintiff. The High Court ruled that s. 52A of the AMLATFAPUA did not have a retrospective effect on seizure orders prior to its effective date. The PP applied for a stay of the order and the High Court granted the stay pending the PP's appeal to the Court of Appeal. On 23 April 2016, at the appeal by the PP against the High Court order, the Court of Appeal remitted the matter to the High Court for *viva voce* evidence. The PP confirmed that the said sum was still kept in the said current account. On 25 May 2017, the High Court, after assessing all the evidence, had allowed the plaintiff's *bona fide* third-party application under s. 61 of the AMLATFA and ordered the said sum in the said current account be released to the plaintiff. On 10 October 2018, the PP's appeal against this order was dismissed by the Court of Appeal. The PP again proffered the confirmation that the said sum was still in the said current account. There was no further appeal and the matter concluded that the said sum in the said current account rightfully belonged

to the plaintiff. Pursuant to the Court of Appeal order, the plaintiff initiated several attempts to recover the said sum but only three months later, on 23 January 2019, the first defendant informed the plaintiff that the said sum was released to the Department of Insolvency following the winding up of TS Steel Sdn Bhd way back on 20 November 2014. The plaintiff thus filed this suit, armed with the Court of Appeal order it was a *bona fide* third party entitled to RM1,270,262.15 in the account of TS Steel Sdn Bhd held at the first defendant. The plaintiff's pleaded case was that the first defendant was negligent in not abiding to the seizure order under the AMLATFA served by the second defendant for the third defendant onto the said account. With the release of the said sum to the Department of Insolvency before the conclusion of the forfeiture proceedings, the plaintiff claimed the first defendant had caused it to lose the said sum that it was entitled to. The plaintiff sued the second and third defendants for negligence in not ensuring the said sum was still preserved by the first defendant throughout the forfeiture proceedings that was ruled in the plaintiff's favour. The plaintiff claimed that the fourth defendant was vicariously liable for the negligence of the second and third defendants. The issues that arose were (i) whether there was negligence by the first defendant; (ii) whether the seizure order was still valid and effective when the first defendant released the said sum to the Department of Insolvency; and (iii) whether there was negligence by the second and third defendants.

Held (allowing plaintiff's claim against first defendant for negligence; dismissing plaintiff's suit against second to fourth defendants):

(1) The custody, care and control of the said current account was under the first defendant. The first defendant was served with both the freeze order and seizure order that prohibited any dealings with the said current account. Following the report that notified the first defendant that TS Steel Sdn Bhd was wound up, DW2, the customer service and operation manager with the first defendant from March 2014 until December 2014, placed his signature on the cheque that remitted the said sum from the said current account to the Department of Insolvency. DW2 admitted that he did not verify whether there was any seizure order or any other prohibition with the current account officers before the said remittance. According to DW2, as the current account officers had already closed the account, DW2 had presumed that all was in order and that it was a normal account without any prohibition. He agreed that the first defendant had failed to conduct the matter according to the best practice that had resulted in the loss suffered by the plaintiff. (paras 21-25)

(2) There were critical witnesses that could provide evidence on the closure of the said current account, the handling of the winding up notice with the actions taken by the first defendant and most importantly the imposition of the freeze order and seizure order on the said current

account. They were the officers in charge of the said current account at the material time. Their non-calling would result in the invocation of s. 114(g) of the Evidence Act 1950 where this court drew adverse inference in favour of the plaintiff, and to a certain extent the second to fourth defendants. No documents were produced to show the standard operating procedure in particular concerning the AMLATFA at the material time. The first defendant had not discharged its evidential burden when it contended in its defence that it had acted according to the best practice and standard operating procedure of the first defendant in relation to the seized property. (paras 27 & 28)

(3) The duty of the first defendant with regard to the said current account was also to comply with any and all lawful orders pertaining to it. The seizure order herein that remained effective until the decision of the forfeiture proceedings meant that the first defendant had owed the duty to comply with it. The forfeiture proceedings was to procure court sanction, in the absence of any *bona fide* third party's claim to it, that the moneys could be forfeited to the Government. The plaintiff sequentially had obtained a court order that the said sum in the said current account rightly belonged to it. Consequentially, the breach of such statutory duty as a result of the first defendant's negligence that resulted in the direct loss of the plaintiff which the Court of Appeal had affirmed as its rightful *bona fide* owner would mean the plaintiff was entitled to claim against the first defendant and enforce its right to it. (paras 30 & 31)

(4) There arose the private right of the plaintiff, so to speak, when the first defendant had breached its statutory duty in failing to have had complied with the seizure order. The harm in the instant of a breach of the statutory duty by the first defendant was considered direct, either to the government in the event the forfeiture proceedings was successful or to TS Steel Sdn Bhd or to any other *bona fide* third party that the court found. Here, the harm to the plaintiff could not be said to be too remote or unforeseeable. The first defendant was not in compliance with the seizure order when it had closed the said current account and remitted the said sum to the Department of Insolvency on 20 November 2014 – a result of the negligence of the first defendant. The first defendant owed a duty of care to administer all the current accounts maintained with it properly according to the law. The law applicable here was AMLATFA whereby compliance to the seizure order was mandatory where the forfeiture proceedings had commenced in March 2014. (paras 33-36)

(5) The second defendant had carried out his duty for and on behalf of the third defendant in ascertaining the final figure in the said account for purposes of the forfeiture proceedings initiated by the Public Prosecutor. The second defendant had communicated with the first defendant prior to the forfeiture proceedings to obtain the final figure in the said account

that was seized. Although the second defendant did not verify with the first defendant on whether the said sum was still in the said account at every stage of the forfeiture proceedings that included the plaintiff's third-party *bona fide* application to the said sum, he had relied on the representation made by the first defendant at the initiation of the said proceedings. The seizure order that was served on the first defendant was still effective. There was no reason for the second defendant or the third defendant to think that the first defendant had breached it. In essence, the first defendant owed a duty of care to laws applicable in the handling of the accounts maintained with it. Due to the first defendant's negligence in complying with the seizure order, the plaintiff directly had suffered losses in the said sum of RM1,270,262.15. (paras 37-45)

(6) Under s. 56(1), the PP has the discretion, where there is no prosecution or conviction under s. 4(1) to apply to forfeit the property. As the seizure order herein was issued on 1 April 2013, the time period for the PP to exercise this option to forfeit was 12 months from that date which was before 1 April 2014. As the PP had commenced the forfeiture proceedings in March 2014, it was within time. Therefore, as the forfeiture proceedings had commenced the seizure order did not lapse. The first defendant was still prohibited from dealing with the seized said account. (paras 47 & 49)

(7) The insertion of the s. 52A after the forfeiture proceedings commenced was not retrospective and did not apply to seizure orders issued before the said law came into force. The seizure order was issued the calendar year prior to s. 52A, and following that, the forfeiture proceedings was more than half a year before the coming into force of s. 52A. The first defendant could not rely on s. 52A as a defence when it closed the said current account and remitted the said sum to the Department of Insolvency. The law, specifically s. 54(3) of AMLATFA, is clear that for so long as the seizure order remained in force, no other action/suit/other civil proceedings shall be instituted or where it was pending before the seizure order, maintained or continued in respect of the said sum in the said account with the first defendant. The winding up petition of TS Steel Sdn Bhd on 4 August 2014 was after the issuance of the seizure order and the commencement of the forfeiture proceedings. So, it did not prevail or override the legal actions under AMLATFA. (paras 53 & 54)

(8) Following the Court of Appeal's decision, the second defendant on behalf of the third defendant had directed for the first defendant to release the said sum to the plaintiff. There was no evidence of bad faith or negligence on the part of the second and third defendants in any of their actions. There was no negligence in the second defendant's conduct

of executing his duties as the investigating officer for the third defendant. There were also no breaches of statutory duty by him and the third defendant. Accordingly, the action against the fourth defendant could not be sustained. The plaintiff's suit against the second to the fourth defendants was thus dismissed. (paras 64 & 65)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

CIMB Investment Bank Bhd v. Ernst & Young & Another Appeal [2014] 6 CLJ 438 CA ***(dist)***

Customs and Excise Commissioners v. Barclays Bank Plc [2006] UKHL 28 ***(refd)***

Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals [2020] 1 CLJ 193 FC ***(refd)***

Lim Hui Jin v. CIMB Bank Bhd & Ors [2018] 8 CLJ 327 CA ***(dist)***

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***

Lornho Ltd v. Shell Petroleum Co Ltd (No 2) [1982] AC 173 ***(refd)***

Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing Act 2001, ss. 44(5), 50(1), 54(3), 56(3), 61(2)

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, ss. 50(1), 52A, 77

Evidence Act 1950, s. 114(g)

Interpretation Acts 1948 and 1967, s. 19(1)

Other source(s) referred to:

Clerks & Lindsell on Torts, 21st edn, pp 611-612

For the plaintiff - V Jeya Kumar & Kee Hui Yee; M/s Kanesalingam & Co
For the 1st defendant - Karen Lee Foong Voon & Ho Zhi Yee; M/s Wong Kian Kheong
For the 2nd, 3rd & 4th defendants - Syahriah Shapiee & Mohd Radzi Shah Abdul Razak; SFCs

Reported by Suhainah Wahiduddin

JUDGMENT

Roz Mawar Rozain JC:

The Plaintiff's Claim

[1] In filing this suit, the plaintiff is armed with a Court of Appeal's order that confirmed it was a *bona fide* third party entitled to RM1,270,262.15 in the account of TS Steel Sdn Bhd held at the first defendant. Unfortunately, the plaintiff could not reap the fruits of its labour as the first defendant had remitted the said sum to the Department of Insolvency pursuant to the winding-up of TS Steel Sdn Bhd.

[2] The plaintiff's pleaded case was that the first defendant was negligent in not abiding to the seizure order under our Anti-Money Laundering, Anti-Terrorism Financing Act 2001 (AMLATFA) served by the second defendant

for the third defendant onto the said account. With the release of the sum to the Department of Insolvency before the conclusion of the forfeiture proceedings, the plaintiff claimed the first defendant had caused it to lose the said sum that it was entitled to.

[3] The plaintiff sued the second and third defendants for negligence in not ensuring the said sum was still preserved by the first defendant throughout the forfeiture proceedings that had ruled in the plaintiff's favour. The plaintiff claimed that the fourth defendant was vicariously liable for the negligence of the second and third defendants.

The Defences Raised

[4] In its defence, the first defendant contended that the seizure order was no longer effective at the time it remitted the said sum to the Department of Insolvency according to s. 52A of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLATFAPUA). The first defendant's position was that s. 52A of the AMLATFAPUA applied retrospectively to seizure orders issued prior to its effective date. Further, the first defendant argued that in any event, no private law duties arose from the alleged statutory breach.

[5] The second and third defendants' defence was that it was the first defendant's duty to abide and comply with the seizure order. The forfeiture proceedings under s. 56 of the AMLATFA was initiated prior to the expiry of the seizure order and so it was still in force. They also took the position that s. 52A of the AMLATFAPUA has no retrospective effect.

This Court's Ruling

[6] This court found that the first defendant was indeed negligent and was liable to the plaintiff, whilst there was no negligence on the part of the second and third defendants. Consequentially, there was no negligence by the fourth defendants. This court's consideration as to the facts and evidence after a full trial and the law are iterated below.

The Salient Facts Of The Case

[7] The salient facts of this case are iterated chronologically as the unfolding of the narrative demonstrated this court's consideration.

[8] On 3 January 2013, a freeze order under s. 44 of the AMLATFA was issued to the first defendant by the third defendant under the hand of the second defendant. It was for the current bank account number 21300003706 of TS Steel Sdn Bhd at the first defendant. This was as part of the efforts to preserve the assets pursuant to an investigation into an alleged customs duties evasion scheme under the direction of the third defendant. The freeze order was valid for 90 days as per s. 44(5) of the AMLATFA.

[9] On 1 April 2013, before the expiry of the 90 days, the Public Prosecutor had issued a seizure order that ordered the first defendant "not to part with, deal in, or otherwise dispose of such property or any part of it until this order otherwise revoked or varied" of which the said current account was listed as one of the properties in the seizure order. The seizure order was issued under s. 50(1) of the AMLATFA. A B

[10] In March 2014, when the Public Prosecutor commenced the forfeiture application to forfeit without prosecution, several bank accounts were involved in the alleged customs duties evasion scheme that included the said current account with the first defendant. For the forfeiture proceedings under s. 56 of the AMLATFA, a confirmation was obtained from the first defendant as to the amount in the said current account. C

[11] On 1 September 2014, s. 52A of the AMLATFAPUA came into force which provided that when there is no prosecution against the party whom the seizure order was issued, its expiry would be 12 months from its issuance or if there was a prior freeze order then twelve months from the issuance of that order. D

[12] On 8 September 2014, at the forfeiture proceedings, a third-party notice was issued under s. 61(2) of the AMLATFA. On 22 September 2014, the third-party notice was gazetted *via* Warta Kerajaan Persekutuan PU(B) 423 under s. 61(2) AMLATFA. E

[13] On 20 November 2014, following a notification that TS Steel Sdn Bhd was wound-up, the first defendant had closed the account and remitted RM1,270,262.15 in it to the Department of Insolvency.

[14] On 14 May 2015, the High Court granted an order in favour of the plaintiff and ordered for the said sum to be released to the plaintiff. The High Court ruled that s. 52A of the AMLATFAPUA does not have a retrospective effect on seizure orders prior to its effective date. The Public Prosecutor had applied for a stay of the order and the High Court had granted the stay on 22 June 2015 pending the Public Prosecutor's appeal to the Court of Appeal. F G

[15] On 23 April 2016, at the appeal by the Public Prosecutor against the High Court order, the Court of Appeal remitted the matter to the High Court for *viva voce* evidence. The Public Prosecutor confirmed that the said sum was still kept in the said current account. This confirmation was repeated by the second defendant at the trial at the High Court. H

[16] On 24 May 2017, the High Court after assessing all the evidence, had allowed the plaintiff's *bona fide* third-party application under s. 61 AMLATFA and ordered the said sum in the said current account released to the plaintiff. I

[17] On 10 October 2018, the Public Prosecutor's appeal against this order was dismissed by the Court of Appeal. The Public Prosecutor again proffered the confirmation that the said sum was still in the said current account. There was no further appeal. The matter concluded that the said sum in the said current account rightfully belonged to the plaintiff.

[18] Pursuant to the Court of Appeal Order, the plaintiff had initiated several attempts to recover the said sum but only three months later on 23 January 2019, the first defendant informed the plaintiff that the said sum was released to the Department of Insolvency following the winding-up of TS Steel Sdn Bhd way back on 20 November 2014.

[19] The chronology of the correspondence is reproduced for the assessment of this court on whether there was non-compliance to the seizure order and also whether the first defendant and/or the second and third defendant was negligent.

Date	Correspondences
7.11.2018	– The plaintiff received the sealed Court of Appeal order – The plaintiff sought the Public Prosecutor's assistance to advise the third defendant to arrange for the return of the said sum – The plaintiff wrote to the third defendant for the return of the said sum
13.11.2018	– The Plaintiff's letter to the Third Defendant recorded the Second Defendant's request for two weeks to arrange for the return of the said sum
27.11.2018	– Since there were no response from the Third Defendant, the Plaintiff wrote to the First Defendant seeking for the release of the said sum
6.12.2018	– The Plaintiff received the Third Defendant's request for supporting documents from the Plaintiff to process the payment of the said sum
7.12.2018	– The Plaintiff furnished the documents requested to the Third Defendant
12.12.2018	– The Third Defendant wrote to the Plaintiff under the hand of the Second Defendant informing that the process for the return of the said sum was arranged and communication was made with the First Defendant. The Third Defendant requested for more time
13.12.2018	– The Plaintiff was copied a letter addressed to the First Defendant from the Third Defendant that requested for the release of the said sum to the Plaintiff pursuant to the Court of Appeal Order

Date	Correspondences
3.1.2019	– The First Defendant informed the Plaintiff that they were looking into the matter
8.1.2019	– The Plaintiff letter to the First Defendant stated that the latter's officers informed the said account had been closed following the winding-up of TS Steel Sdn Bhd and demanded the release of the said sum to the Plaintiff within fourteen days
23.1.2019	– The First Defendant responded to the Plaintiff with information that the said sum was released to the Department of Insolvency on 20.11.2014 and cited the reason that the Seizure Order had expired since 3.1.2014
24.1.2019	– The Plaintiff sought information from the Department of Insolvency. The Plaintiff received confirmation that TS Steel Sdn Bhd's file was opened but no other response

[20] As the defendants were either irresponsive or could not confirm the exact date for the return of the said moneys, two complaints were lodged to Bank Negara Malaysia by the plaintiff against the first defendant. The plaintiff had also filed a police report.

Liability Of The First Defendant

(i) Whether There Was Negligence By The First Defendant

[21] Throughout the whole time, the said moneys had remained in the said account with the first defendant. The second and third defendants did not physically seize it. Thus, the custody, care and control of the said current account was under the first defendant's. The first defendant was served both the freeze order and seizure order that prohibited any dealings with the said current account. The first defendant's confirmation and/or representation on the final figure that remained in the said current account was also given for the initiation of the forfeiture proceedings.

[22] DW2 Nasrol bin Yatim was the customer service and operation manager with the first defendant from March 2014 until December 2014. Following the MC2125P report in November 2014 that notified the first defendant that TS Steel Sdn Bhd was wound up, he had placed his signature on the cheque that remitted the said sum from the said current account to the Department of Insolvency. He testified that it was according to the standard operating procedure of the first defendant although he could not confirm which one was applicable at the first defendant at that time.

[23] As for DW2, he had not seen the freeze order nor the seizure order. He further testified that in the event that there was a seizure order served on the said account, there would be a maintenance in the system to notify *via* a pop-up window, that there was a seizure order on the said current account and to prohibit any transaction pertaining to the said current account.

[24] When DW2 was to sign off the document and the cheque to the Department of Insolvency, he had not seen any notification or prohibition in the system as such. He had testified that the said current account was already closed. It was closed by the current account officer(s) at the material time. Because the said current account had already been closed, he was unable to verify through the first defendant's system whether there was maintenance/notification on the said current account that prohibited any transaction pertaining to the said account.

[25] He admitted that he did not verify whether there was any seizure order or any other prohibition with the current account officer(s) before the remittance to the Department of Insolvency. As the current account officer(s) had already closed the account, DW2 had presumed that all was in order and that it was a normal account without any prohibition or specifically, the seizure order was in place on the said current account when he had signed the remittance. He had agreed that the first defendant had failed to conduct the matter according to the best practice that had resulted in the loss suffered by the plaintiff.

[26] Furthermore, DW2 and DW3 could not confirm whether there was standard operating procedure for anti-money laundering by the first defendant. There were no documents adduced or made available to this court for its consideration in assessing whether the first defendant had complied to procedures and was not negligent in the non-compliance with the seizure order.

[27] A witness, supposedly the current account officer of the first defendant at the material time, was listed as a witness and his written statement filed but he was not called by the first defendant to testify at trial. Another witness, named by DW2, was also not called. This court found that they are critical witnesses that could provide evidence on the closure of the said current account, the handling of the winding-up notice with the actions taken by the first defendant and most importantly the imposition of the freeze order and seizure order on the said current account. They were the officers in charge of the said current account at the material time.

[28] Their non-calling would result in the invocation of s. 114(g) of the Evidence Act 1950 where this court drew adverse inference in favour of the plaintiff, and to a certain extent the second to fourth defendants. No documents were produced to show the standard operating procedure in particular concerning AMLATFA at the material time. To this, this court

found that the first defendant had not discharged its evidential burden when it contended in its defence that it had acted according to the best practice and standard operating procedure of the first defendant in relation to the seized property.

[29] This court also found the first defendant's argument of having no knowledge on the forfeiture proceedings unacceptable. The first defendant had represented and confirmed the amount in the said current account for the purposes of the forfeiture proceedings. The second respondent had confirmed he had verified with the first defendant that the amount was still there prior to the commencement of the forfeiture proceedings. It was with the compliance unit of the first defendant. When the forfeiture proceedings was remitted back to the High Court as directed by the Court of Appeal to be heard *viva voce* evidence, his testimony was reliant on the confirmation by the first defendant given at the commencement of the suit. The undisputed fact was that the first defendant did not seek advice or permission or even informed the second and third defendants that it had remitted the said sum to the Department of Insolvency.

[30] The duty of the first defendant with regard to the said current account was also to comply with any and all lawful orders pertaining to it. In this case, the seizure order that remained effective until the decision of the forfeiture proceedings means that the first defendant had owed the duty to comply with it. The forfeiture proceedings was to procure court sanction, in the absence of any *bona fide* third party's claim to it, that the moneys could be forfeited to the government. The plaintiff sequentially had obtained a court order that the said sum in the said current account rightly belonged to it.

[31] Consequentially, the breach of such statutory duty as a result of the first defendant's negligence that resulted in the direct loss of the plaintiff which the Court of Appeal had affirmed as its rightful *bona fide* owner would mean the plaintiff was entitled to claim against the first defendant and enforce its right to it. See *Clerks & Lindsell on Torts'* 21st edn, at pp. 611 to 612 and *Lornho Ltd v. Shell Petroleum Co Ltd (No 2)* [1982] AC 173 on how a private right may arise in breaches of the statutory duty imposed for the protection of a limited class of the public.

[32] The provisions relating to seizure and forfeiture in the AMLATFA, now AMLATFAPUA, have to be read as a whole to ascertain their application. The law provides for the criminal penalty against the first defendant should there be non-compliance with the seizure order (s. 50). There are clear prohibitions as to any dealings of the said sum in the said account (s. 54). There arose the option to forfeit the said sum in the said account in cases like this when there was no prosecution (s. 56). Where there are *bona fide* parties who can show that they are the rightful owner of the said

sum in the said account, the law allows and recognises that rightful *bona fide* ownership – such as the plaintiff here over the said sum in the said account. In the meantime, whilst the courts adjudicate on *bona fide* third-party applications, here it was the plaintiff's, the first defendant was prohibited from dealing with the said sum in the said account. The law protects the first defendant from any claims that may arose in respect of its compliance with the seizure order (s. 50(2) and s. 77).

[33] This court took the position that there arose the private right of the plaintiff, so to speak, in this case when the first defendant had breached its statutory duty in failing to have had complied with the seizure order. The harm in the instant of a breach of the statutory duty by the first defendant was considered direct, either to the government in the event, the forfeiture proceedings was successful or to TS Steel Sdn Bhd or to any other *bona fide* third party that the court found. Here, the harm to the plaintiff cannot be said to be too remote or unforeseeable.

[34] The legal principle enunciated by the House of Lords in *Customs and Excise Commissioners v. Barclays Bank plc* [2006] UKHL 28 that was adopted by our Federal Court in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008 and also by the Court of Appeal in *CIMB Investment Bank Bhd v. Ernst & Young & Another Appeal* [2014] 6 CLJ 438 is acknowledged but the facts of the cases distinguished.

[35] This court assessed the evidence and found that the first defendant was not in compliance with the seizure order when it had closed the said current account and remitted the said sum to the Department of Insolvency on 20 November 2014 – a result of the negligence of the first defendant.

[36] The service of both the freeze order and seizure order on the first defendant though admittedly received was not recorded anywhere in its system or records. The first defendant owed a duty of care to administer all the current accounts maintained with it properly according to the law. The law applicable here is AMLATFA whereby compliance to the seizure order is mandatory where the forfeiture proceedings had commenced in March 2014.

[37] The second defendant had carried out his duty for and on behalf of the third defendant in ascertaining the final figure in the said account for purposes of the forfeiture proceedings initiated by the Public Prosecutor. In the cross examination by the first defendant, the second defendant had testified that he had communicated with the first defendant prior to the forfeiture proceedings to obtain the final figure in the said account that was seized. The figure obtained was RM1,270,262.15 which was the said sum in the said current account. The communication was done *via* Bank Negara Malaysia.

[38] The forfeiture proceedings was premised on the final figure represented by the first defendant. So, the first defendant's contention that they were not aware of the fact that the forfeiture proceedings had commenced was unacceptable.

[39] Although the second defendant did not verify with the first defendant on whether the said sum was still in the said account at every stage of the forfeiture proceedings that included the plaintiff's third-party *bona fide* application to the said sum, this court accepted that he had relied on the representation made by the first defendant at the initiation of the said proceedings.

[40] The seizure order that was served on the first defendant with the notification that it was not to deal with the said sum in the said account until otherwise revoked or varied, was still effective. There was no reason for the second defendant, or the third defendant to think that the first defendant had breached it.

[41] In essence, this court found that the first defendant's argument that it had no knowledge of the plaintiff's *bona fide* claim and the Court of Appeal's order until 14 December 2018 following the letter signed by the second defendant untenable and at the very least, immaterial. This was because this court opined that the first defendant should not have breached the seizure order with the closure of the said current account and the remittance of the said sum to the Department of Insolvency when the proceedings were on-going.

[42] This first defendant's arguments that there was no negligence on its part due to its non-involvement in the forfeiture proceedings were unacceptable. Its role and involvement pertaining to the forfeiture proceedings was to confirm and verify the final figure in the said current account to which the forfeiture proceedings were initiated on.

[43] The Department of Insolvency through DW1 had confirmed that it had no knowledge that the seizure order was in place and that it was not informed by the first defendant of the same. The first defendant did not seek confirmation/direction/advice from the second and/or third defendant prior to the remittance to the Department of Insolvency.

[44] The first defendant argued that the plaintiff ought to have had given notice of its third-party *bona fide* application to it and conducted regular verification with it to ensure the said sum had remained. Even conducting regular searches to ensure TS Steel Sdn Bhd was not wound up was argued as steps that the plaintiff ought to have taken. All these were untenable as it was not the plaintiff's duty and obligation to comply with the seizure order. The plaintiff on its part, had taken actions according to the law by having made its third-party *bona fide* application.

[45] In essence, this court found that the first defendant owed a duty of care to laws applicable in handling of the accounts maintained with it. Due to the first defendant's negligence in complying with the seizure order, the plaintiff directly had suffered losses in the said sum of RM1,270,262.15.

(ii) Was The Seizure Order Still Valid And Effective When The First Defendant Released The Said Sum To The Department Of Insolvency?

[46] This question arose as the defence of the first defendant was that the seizure order had lapsed when it released all the moneys (including the said sum) in the said current account to the Department of Insolvency on 24 November 2014.

[47] Under s. 56(1), the Public Prosecutor has the discretion, where there is no prosecution or conviction under s. 4(1) to apply to forfeit the property. In this case, as the seizure order was issued on 1 April 2013, the time period for the Public Prosecutor to exercise this option to forfeit is twelve months from that date which is before 1 April 2014. As the Public Prosecutor had commenced the forfeiture proceedings in March 2014, it was within time.

[48] The law provides at s. 56(3) if no such forfeiture proceedings were initiated then the seizure order would have expired at the said twelve months from 1 April 2013 and the property, the said sums in the said current account must be released to whom it was seized. For easy reference, the provision is produced herein:

> Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

[49] Therefore, as the forfeiture proceedings had commenced, the seizure order did not lapse as contended by the first defendant. The first defendant was still prohibited from dealing with the seized said account. In other words, as the law clearly stipulates, the seizure order would have only expired on 1 April 2014 if there had been no forfeiture proceedings were initiated.

[50] The insertion of the s. 52A after the forfeiture proceedings commenced, is not retrospective and does not apply to seizure orders issued before the said law came into force. This court agreed with the submissions by the plaintiff on the general rule is as per the maxim *Lex prospicit non respicit* – the law does not look back. Unless it is expressly provided in the statute that the said law does. The Federal Court's decision in *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749 took this position as stated at p. 216 (CLJ); p. 755 (MLJ):

Still, we could take this opportunity to uphold that it is indeed a rule of construction that a stature should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute (*Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 MLJ 1 per Lord Brightman, delivering the advice of the Board).

In *National Land Finance Co-operative Society Ltd v. Director General of Inland Revenue* [1994] 1 MLJ 99, Gunn Chit Tuan CJ (Malaya) said:

On the retrospective operation of Acts, the presumption is an enactment is not intended to have a retrospective operation unless a contrary intention appears. In this case, the presumption has been rebutted because s. 1(5) of the Amendment Act states in clear terms, that the amendment was intended to be retrospective. But a retrospective operation should not be given to a statute to impair an existing right and it has been stated by the UK Court of Appeal in *EWP Ltd v. Moore* [1992] 1 All ER 880 at p. 891:

... that those who have arranged their affairs, as the saying is, in reliance on a decision of these courts which has stood for many years should not find that their plans have been retrospectively upset ...

Moreover, one should avoid a construction that inflicts a detriment and as Lord Brightman has said in *Yew Bon Tew v. Kenderaan Bas Mara* [1983] 1 MLJ 1 at p. 2:

A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past.

If it takes away a substantive right, the amendment will not have a retrospective effect, save by clear and express words. If it is procedural, retrospectivity applies unless otherwise stated in the statute concerned (*MCG Pillai v. Tan Sri Dato Vincent Tan Chee Yioun* [2002] 2 MLJ 673 per Steve Shim CJ (Sabah & Sarawak). If the legislature intends an amendment to have retrospective application, it must expressly and clearly say so (see *Puncakdana Sdn Bhd v. Tribunal for Housebuyers Claims and another application* [2003] 4 MLJ 9 per Md Raus J, as he then was). But retrospective effect was not manifested in the language of the amendment. Hence, the amendment to reg. 11(2) must be constructed as a prospective provision without any retrospective application.

[51] Learned Senior Federal Counsel for the second to fourth defendants had also cited the decision by the Federal Court in *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals* [2020] 1 CLJ 193 that decided in construing a statute, s. 19(1) Interpretation Acts 1948 and 1967 (Act 288) has relevance and application in that a particular law shall commence and take effect as the date provided for by/in the Act or where no date is so provided, the date immediately following the date of its publication.

[52] This court has considered all the authorities cited by all parties and found that there is no intention for s. 52A to be applied retrospectively. This deduction is absurd because if s. 52A was to be applied retrospectively, it meant that the expiry of the seizure order would be calculated twelve months after the freeze order which would be 3 January 2014 – eight months before s. 52A itself came into force.

[53] The absurdity would also cause much unfairness concerning rights and obligations of many parties involved. The freeze and seizure orders were issued prior to the amendment and insertion of s. 52A so the facts of the case in *Lim Hui Jin v. CIMB Bank Bhd & Ors* [2018] 8 CLJ 327 decided by the Court of Appeal are distinguished. The seizure order was issued the calendar year prior to s. 52A, a good 17 months and following that, the forfeiture proceedings was more than half a year before the coming into force of s. 52A. The first defendant cannot rely on s. 52A as defence when it closed the said current account and remitted the said sum to the Department of Insolvency on 20 November 2014.

[54] The law, specifically s. 54(3) of the AMLATFA, is clear that for so long as the seizure order remained in force (and here the court holds it so as the forfeiture proceedings had commenced), no other action/suit/other civil proceedings shall be instituted or where it was pending before the seizure order, maintained or continued in respect of the said sum in the said account with the first defendant. The winding-up petition of TS Steel Sdn Bhd on 4 August 2014 was after the issuance of the seizure order and the commencement of the forfeiture proceedings. So, it did not prevail or override the legal actions under AMLATFA.

[55] Evidence of the second defendant was that during his communication with the first defendant for the release of the said sum to the plaintiff, the first defendant did not inform him that the said sum was remitted to the Department of Insolvency. Neither did the first defendant informed him that the said sum had been released based on its belief that the seizure order had lapsed on the assumption or lack of knowledge of any forfeiture proceeding or any other action. The first defendant's contention of the applicability of s. 52A had only arisen later when the plaintiff requested for the release of the said sum pursuant to the Court of Appeal order.

[56] Evidence on the process and procedure of the remittance of the said sum to the Department of Insolvency as addressed in detail above apparently showed the first defendant's defence contending the retrospective application of s. 52A is an afterthought. Evidence showed that although the seizure order was served, it was not abided to as the said current account was closed upon the notice of the winding-up of TS Steel Sdn Bhd. Further, the said sum was remitted to the Department of Insolvency although the first defendant knew not just of the seizure order but the forfeiture proceedings.

[57] The timeline stipulated above clearly also suggested the afterthought as the plaintiff had written directly to the first defendant in November 2018 and it was only towards the end of January 2019 that the latter confirmed the position. Nevertheless, it cannot be applicable.

(iii) Defence Of Private Cause Of Action Not Pleaded

[58] The first defendant submitted that even if there was a breach of the seizure order, the law does not confer the plaintiff with a private cause of action or remedy. This issue was not pleaded in the first defendant's defence. The main defence of the first defendant pleaded was that it had no knowledge whatsoever of the forfeiture proceedings or the plaintiff's third-party *bona fide* application. It was also pleaded that the first defendant did not owe any duty or obligation to the plaintiff.

[59] The defence that the law does not confer a private cause of action or remedy was not pleaded. This court was inclined to agree with the submissions by the plaintiff that the first defendant was barred from raising the same – *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 2 MLJ 331 referred. This court found it unjust to allow this argument with no opportunity given to the plaintiff and the second to the fourth defendants to present their case and arguments to expostulate the issue.

[60] In this case, the Court of Appeal had ordered for the release of the said sum in the said account to the plaintiff. The plaintiff sought a remedy over the alleged (mis)conduct by the first defendant, and also the second to fourth defendants, in the nature of negligence when the statutory duty/obligation (the seizure order) was breached.

[61] Turning to the law of negligence, this court examined the evidence on the handling of the said account by the first defendant that led to the remittance of the said sum to the Department of Insolvency. This court concluded on a balance of probabilities that there was negligence on the part of the first defendant that resulted in the breach and non-compliance of the seizure order. That in turn had directly caused loss and damages to the plaintiff.

Liability Of The Second And Third Defendants – Whether There Was Negligence By The Second And Third Defendants

[62] Once the seizure order was issued, the first defendant was not to deal with the moneys until the seizure order was varied or revoked. More so when the forfeiture proceedings commenced where the first defendant's confirmation as to the final figure in the said current account was obtained for the purposes of the forfeiture proceedings. All this was before the release of the moneys including the said sum from the said current account to the Department of Insolvency.

[63] Therefore, the confirmation by the second defendant for the third defendant that the said sum was still in the said account during the trial/ hearing of the forfeiture proceedings and the appeals at the Court of Appeal was based on the representation made by the first defendant on the final figure for the commencement of the forfeiture proceedings. The said representation was relied upon when the second defendant testified in the forfeiture proceedings which was a few months later to the time when the representation was made.

[64] Following the Court of Appeal's decision in October 2018, the second defendant on behalf of the third defendant had directed for the first defendant to release the said sum to the plaintiff. There was no evidence of bad faith or negligence on the part of the second and third defendants in any of their actions.

[65] Assessing the testimony of the second defendant at trial and all the evidence adduced, this court found that there was no negligence in his conduct of executing his duties as the investigating officer for the third defendant. There were also no breaches of statutory duty by him and the third defendant. Accordingly, the action against the fourth defendant cannot be sustained. This court dismissed the plaintiff's suit against the second to the fourth defendants.

Order

[66] As a result of the first defendant's negligence, this court orders the first defendant to pay the plaintiff:

(i) the said sum of RM1,270,262.15 as damages;

(ii) interest at 5% per annum on the said sum to be calculated from 10 October 2018 until full settlement. This is premised on the date of the Court of Appeal's order that confirmed the said sum belonged to the plaintiff; and

(iii) costs on client and solicitor basis – here this court orders the cost of RM300,000 requested by the plaintiff as the proceedings to recover the said sum from the said current account was initiated back in 2014 and had involved in appeals to the Court of Appeal in two instances including trials at the *bona fide* third-party application as well as this one.

[67] The plaintiff had failed to prove negligence on the part of the second and third defendants and is ordered to pay the second to fourth defendants collectively costs of RM50,000.